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COVENANTS FOR TITLE IN INDIA.

The subject of covenants for title has not lost any of its interest by reason of the fact that in the Transfer of Property Act the legislature has introduced provisions for the implication of covenants for title in conveyances executed subsequent to the date of its enactment. It is open to parties to adopt a form of conveyance which relies upon the implied covenants for title or the old form of conveyance with express covenants. It therefore becomes necessary to determine which form of conveyance is more advantageous to a party, assuming that he is entitled to demand a conveyance in either form. In cases in which the agreement for transfer is silent about the covenants for title, we do not think it is competent to the parties to demand any other covenants than those which would be implied by the statute in regard to the particular transaction.

It is only where the terms of the agreement for a conveyance provide for the insertion of other covenants for title than those implied by law, that a party can insist upon such covenants being inserted. He must make up his mind whether he should rest content with the implied covenants or whether he should stipulate in the agreement for any express covenants. We shall therefore consider what covenants could be demanded by a purchaser before the Act and whether they are more or less advantageous than those now implied by statute.

Language has sometimes been employed by judges which would seem to suggest that covenants for title were unknown in this country prior to their introduction by statute. Such a view however would be erroneous. So far as conveyances drawn up in

the vernaculars are concerned, they usually contain a covenant for title, though not in the elaborate form familiar to English conveyancers. And as regards conveyances drawn up in English, they have been usually drawn up by solicitors and in the English form with express covenants for title. We shall first consider the various covenants which are usual in conveyances in the English form.

In the case of a sale the usual covenants in England are those for good right to convey, for quiet enjoyment, against incumbrances and for further assurance. In former times there was another covenant usual in conveyances, *viz.*, the covenant for seisin but in course of time it came to be regarded as synonymous with the covenant for good right to convey and has accordingly been omitted in conveyances in England. In *Howell* v. *Richards,* 11 East, 642, the covenant for seisin was defined by *Lord Ellenborough* to be an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey. In the case of sales in England, the four modern covenants which we have mentioned are usually limited to the acts of the vendor and persons claiming under him, if he has acquired the estate by purchase for money or other valuable consideration, see Dart's Vendors and Purchasers, 6th edition, p. 616. But if the vendor has not acquired the estate by purchase, the purchaser is entitled to require covenants extending to the acts of the last person who thus claimed by purchase. In the case of a mortgage the covenants are not restricted to the acts of the mortgagor, but are against the acts of all claiming by title. In the case of leases the usual covenant is that for quiet enjoyment and as the title is not generally examined by the tenant, the covenant is not limited to the acts of the lessor, *Calvert* v. *Sebright,* 15 Beav, 156, 159. The rules which had thus sprung up from the practice of conveyancers and received the sanction of the courts were with slight modification adopted by the legislature in the Conveyancing and Law of Property Act of 1881, (44 and 45 Vic, Ch. 41, S. 7.)

The four convenants which before the Act were required to be expressly inserted in a conveyance are now implied by the statute and it is unnecessary for the parties to make any mention of them in the conveyance. The modification that we referred to is that in the case of leases the covenants implied by the statute

are the same as in the case of sales and that a purchase for value is not deemed to include a conveyance in consideration of marriage. Before we proceed further, it is necessary to try and discover the reason for the distinction made between sales and leases on the one hand, and mortgages on the other, why the covenants are limited in the one case to the acts of the last purchaser for value, and why they are unlimited in the latter case. To a plain mind it seems to be just that a vendee or lessee should be entitled to the same protection to which a mortgagee is entitled. The reason for the difference is alleged to be, that the object of a mortgagee is not to acquire a particular estate, but to obtain full security for the repayment of his loan. Williams on Real Property, (12th Ed.), 647. On the other hand in the case of a sale or a lease, the object of the vendee or lessee is supposed to be to acquire no higher interest than that possessed by the vendor or lessee in the property. It is supposed to be understood that the vendor sells the estate as he receives it and if the vendor puts the purchaser in the same situation as himself, the purchaser has really no grievance. There was neither hardship, nor injustice, said *Lord Eldon* in *Browning* v. *Wright*, 2 Bos & Pul, 23, if the defect in the vendor's title depended upon the acts of those who had the estate before him, and he honestly but ignorantly proposed to another person to stand in his situation. The assumption on which this justification of a qualified covenant rests appears to us to be contradicted by experience. If the question were put to them, most purchasers would unhesitatingly answer that they expected to acquire the very estate which the vendor professed to transfer, and not some different estate which the vendor might chance to possess. The duty of not causing disappointment of reasonable expectations is at the basis of all justice and the fact that the vendor might himself have been disappointed in his expectations affords no justification for causing disappointment to a second person. Another ground on which this rule is rested is that if covenants for title are given extending to the acts of the last purchaser for value, the covenants which that purchaser and the purchasers before him would have obtained would complete the chain and give full protection to the purchaser. It is needless to observe that this view rests upon the assumption that covenants for title have been regularly obtained by the

successive purchasers aad that it is hardly applicable to countries in which conveyancing has not grown to the same luxuriance of elaborateness as in England. We cannot do better than quote the vigorous criticism in Humphrey on Real Property, p. 77, of the reasons adduced in favor of the distinction we have pointed out. "The professed rule is that there should be a chain of covenants throughout the title, connecting those of the alienor with those of the preceding owner who has last covenanted. To this rule, however, there are the following several objections of expediency and of precedent. First, such a qualified warranty never actually enters the contemplation of the contracting parties. Whoever acquires land at its full value expects an equally complete indefeasible title to it. The notion of concatenated fractions of an entire obligation rendering the alienor answerable for the faults of the first link only, and then referring the alienee, for all prior defects, to the exhausted assets of long-deceased strangers, is too revolting to suppose it would be accepted as a guarantee by any purchaser to whom it was once explained. Should it be urged, you have the title to inspect, he would reply, such are the complications of real property, and the inadequate means of search, that with all reasonable diligence defects must often remain undiscovered, and a purchaser is not concluded by latent faults. Under the Roman Law, the seller on the eviction of the purchaser, was answerable to him for the loss, under certain qualifications interposed for the protection of the former. The Code Napoleon, (1826—1840), in framing which both precedent and principle were fully discussed imposes an absolute warranty on a seller in case of eviction, to be answered in damages, the amount of which is chiefly regulated by the price and by the subsequent permanent improvements." The highly artificial reasoning by which the limitation of a vendor's covenants is supported has not found favor in countries less fettered by tradition and precedent than England and we accordingly find in modern Codes a more rational set of rules on the subject. Under the New York Civil Code (Art. 863) an agreement to give the usual covenants binds the grantor to give covenants of seisin, quiet enjoyment, further assurance, general warranty and against incumbrances which must be expressed to the effect that the grantor is now seized in fee simple of the property granted, that the grantee shall enjoy the same without any lawful disturbance, that the same

is free from all incumbrances, that the grantor and all persons acquiring any interest in the same through or for him will on demand execute and deliver to the grantee at the expense of the latter any further assurance of the same that may be reasonably required and that the grantor will warrant to the grantee all the said property against every person lawfully claiming the same. In the Civil Code of Lower Canada, (Weir, Ss. 1506—1521), warranties are of two kinds, legal or conventional. The seller is obliged by law to warrant the buyer against eviction of the whole or any part of the thing sold, by reason of the act of the former, or of any right existing at the time of the sale and against incumbrances, not declared and not apparent at the time of sale. This legal warranty has the effect of an unlimited covenant for quiet enjoyment and the other covenants for title being thus rendered unnecessary, the Code makes no provision for them. Under S. 1509 the seller cannot even by express agreement release himself from the liability to warranty against his own personal acts. Even when there is a stipulation excluding warranty, the seller is in case of eviction obliged to return the price of the thing sold, unless the buyer knew at the time of the sale the danger of eviction, or had bought at his own risk, (S. 1510).

Though we have stated that the usual covenants in a sale in England are qualified or limited to the acts of the vendor and persons claiming under him, they may by agreement of parties be absolute or unlimited also. Where the covenants are unqualified *i.e.*, purport to assure the purchaser from disturbance on the part of the grantor or any person or persons whomsoever, the generality of this general assurance is subject to certain well-settled qualifications. Such a general covenant is not broken by tortious disturbances, *Hayes* v. *Bickerstaff*, Vaughan, 118. It was pointed out in this case that the covenant however generally expressed must be understood to apply merely to the acts of those claiming by title because, first, the grantor does not expressly covenant against tortious acts of strangers; secondly, it would be unreasonable that he should do so, as he could neither foresee nor prevent them; thirdly, the law gives the covenantee a remedy against the wrong-doer; fourthly, the covenantee might thus have a double remedy and satisfaction, one against his covenantor and the other against the wrong-doer; fifthly, it would enable him to injure the covenantor

by colluding with a stranger to make a tortious disturbance; and sixthly, because the express words of the covenant were that the covenantee should *lawfully* enjoy the premises without the let or hindrance of the covenantor or any other person. The qualification limiting the disturbances to those made under color of title is itself subject to three exceptions, (Rawle on Covenants for title, 5th Ed., S. 126, Dart's Vendors and Purchasers p. 883, 887 : (1) The covenant extends to all acts of the covenantor himself whether tortious or otherwise. (2) If the covenant be expressly against the acts of a particularly named person it will not be restrained to his lawful acts, since the covenantor is presumed to know the party against whose acts he covenants, and may therefore be reasonably expected to stipulate against all of them. (3) Where the plain intention of the covenant manifested by express words is to protect the covenantee against claims of every description, as where it is against all claiming or pretending to claim, (*Chaplain* v. *Southgate*, 10 Mod, 383.)

Again a general covenant against disturbances by any persons whomsoever will not extend to acts of sovereignty.

Having made these remarks about the distinction between absolute and qualified covenants, we shall now see when the various classes of covenants are held to be broken, and when time begins to run against the covenantee in favor of the covenantor. In the earlier part of this century it was held in England, *Kingdom* v. *Nottle*, 4 Maule & Selw, 53, that the breach of a covenant for seisin must be regarded as a continuing breach and that although according to the letter of the covenant there might be a breach on the instant of its creation, yet according to its spirit the right of action should pass to, and rest in, the party in whose time the substantial breach occurred and who ultimately sustained the damage. The fact that the covenant was one which ran with the land was in the opinion of *Dampier, J,* inconsistent with the supposition that it might be broken and ceased *eo instanti* that it was broken. The doctrine of a continuing breach has however been disapproved in the later case of *Spoor* v. *Green,* L. R, 9 Exch, 99. The later view however has the effect of almost destroying the value of the covenant, for the breach may remain undiscovered for a long time and the period of limitation may have expired, see the dissenting

judgment of Kelly, C. B, in the above case. The Conveyancing Act of 1881 provides that the benefit of the implied covenants shall run with the land. Whether this provision will have the effect of enabling a grantee or his assigns to treat the breach as a continuing one and calculate the period of limitation from the moment that there is a substantial breach, or whether it merely has the effect of transmitting the right of action which arises on the technical breach of the covenant at the very moment of its creation from the immediate grantee to his assigns and enabling them to sue for such breach within the period of limitation calculated from the date of the covenant is doubtful. However beneficial it may be, the former view appears to us to involve a very forced interpretation of the Act. The covenant for quiet enjoyment is broken only when the possession is disturbed. The covenant against incumbrances is frequently styled in England the covenant for indemnity against incumbrances and its place there is invariably after that for quiet enjoyment being connected therewith by the words "and that (*i.e.*, the quiet enjoyment) free and clear of all incumbrances &c.," (Rawle, S. 70). The covenant for incumbrances implied by the Conveyancing and Law of Property Act of 1881 has an exactly similar scope and the object of this covenant as well as the covenant for quiet enjoyment being to assure the possession to the purchaser, it is broken only when the enjoyment is disturbed, (see Dart's Vendors and Purchasers, 6th ed., p. 881). The covenant for further assurance is a covenant *in futuro* and is broken only upon the refusal of the covenantor to comply with a request by the covenantee to do such further acts as may be necessary to perfect his title.

Turning our attention now to the Transfer of Property Act, it is provided in regard to sales that the seller shall be deemed to contract with the buyer, that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same, and that the benefit of the contract shall run with the land, S. 55, Cl. (2). The seller is also, except where the property is sold subject to incumbrances, bound to discharge all incumbrances then existing, S. 55, Sub-S. 1, Cl. (*g*). The buyer is thus entitled to the benefit of an unlimited covenant against incumbrances and for good right to convey. Why the covenants for quiet enjoyment and further assurance are omitted, it is not easy to understand.

The Indian Law Commissioners in their report of 1879 state that they considered it unnecessary to introduce any other implied covenants than the two provided in the Act. As to the reason which led them to consider the other covenants unnecessary we are entirely left in the dark. If the implied covenants contained in the statute were sufficient for all practical purposes, the other covenants would no doubt be unnecessary. If there was a single sweeping covenant in the Transfer of Property Act similar to the legal warranty against eviction provided by the Canadian Code, all the other covenants of title would be superfluous. As it is, however, we are afraid that the protection conferred by the Indian Act is in one important respect defective as compared with the provision of the English Act. If a breach of the covenant for good right to convey implied by Sub- S. 2 could be regarded as a continuing breach, the purchaser might obtain adequate protection. But we have already pointed out that according to a recent decision in England a covenant of this kind is broken as soon as it is made, and that time begins to run from the date of the covenant. The same view has been taken by the courts in India also; see *Raju Balu* v. *Krishnarav Ramchandra*, I. L. R, 2 B, 273; *Hanuman Kamut* v. *Hanuman Mandur*, I. L. R, 15 C, 51.

The advantage therefore which a purchaser would derive from the unlimited character of the implied covenants is more than counter-balanced by the fact that his right to sue in respect of a defect in the title may become barred long before he ever becomes aware of it. Mortgagees are, as in England, in a more favorable position, being entitled to unlimited covenants for title, (S. 65). A lessee is under the Act entitled to an absolute covenant for quiet enjoyment, S. 108, Sub-S. A, Cl. (*c*). And so long as a lessee is entitled to this covenant, it is immaterial to him whether he gets or not the other covenants. Though the implied covenants which arise in favour of a purchaser are thus less advantageous than the covenants implied by the English Act, it is open to the purchaser to protect himself by stipulating in the agreement for sale for wider express covenants. Where the conveyance contains express covenants for title, the question may arise whether the express covenants exclude the operation of the implied covenants. To this question a clear answer has been returned by the Privy Council in *The Chaudiere Gold Mining Company* v. *Desbarats*, L. R, 5 P. C,

277, 299, where their Lordships laid down that it seemed to be a reasonable, if not a necessary, implication from the insertion of a limited conventional warranty, that it was the intention of the parties to exclude the larger legal one, though the conventional warranty did not contain the word *only* or other equivalent expression. The terms of S. 55 of the Transfer of Property Act lend themselves more readily to this view than those of S. 7 of the English Conveyancing Act. For while the English Act lays down that in every conveyance, certain covenants for title shall be implied, the Indian Act only provides that in the absence of a contract to the contrary, certain covenants shall be deemed to be included.

If we turn to the vernacular forms of conveyancing which are in use among the natives of this country and which are so often unjustly disposed, we find that in the matter of covenants for title, vernacular conveyances are superior to the cumbrous deeds which are the delight of English solicitors. Speaking with reference to this Presidency and especially the Tamil-speaking Districts, it may be safely said that in nearly all sale-deeds will be found words to the effect that there are no disputes about the title and that if any disputes should arise, the vendor would come forward and settle or clear the same. This clause is very brief and apt and amounts to a general warranty against eviction. A single sweeping covenant like this renders all the other covenants superfluous. Covenants of this kind have been held by the Madras High Court to entitle the purchaser to sue the vendor for damages upon disturbance or eviction. A similar covenant was held by the North Western Provinces High Court to be implied under the common law in India in contracts of sale and mortgage. In *Dwarka Dass* v. *Ratian Singh*, 2 Agra, 199, the court held, "Although there may be no express covenant for title, a vendor or mortgagor must always be held impliedly to warrant the title of the property sold or mortgaged, and if it be found that the title is defective, the vendee may sue on the breach of the implied contract." In this case it was held that time began to run from the date of eviction.

We wish to consider one other question in connection with this subject, *viz.*, whether a covenant extends to a known defect. In *Ghousiah Begum* v. *Rustumjah*, I. L. R, 13 M, 161, it was held by *Wilkinson, J.* that a purchaser might be precluded from taking objection to the vendor's title by the fact that he had clear notice

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of the state of the title before he entered into the contract for sale, and that this was more especially the case where the vendor and vendee dealt without legal advice and the purchaser relied on the implied covenant for title. On the other hand it was laid down by *Muthusami Aiyar, J.* that an agreement to take such title as the vendor has is in restraint of the purchaser's legal right and that when it is set up as being antecedent to a written contract in a suit to enforce specific performance, it must at all events be established with the greatest clearness and precision. The view taken by *Muthusami Aiyar, J.* is the correct view of the matter and is supported by principle and authority. When a party is bound by law or agreement to warrant the title, it rests upon him to show that a known defect was excepted from the operation of the warranty, and the mere fact of the knowledge of such defect by the purchaser does not amount to an agreement by him to take the risk of it. On the other hand it may be said that the purchaser's knowledge of a defect is the very reason why the covenant should be deemed to have been relied upon by the parties and included to cover it. In *Ram Chunder Dutt* v. *Dwarkanath Bysack*; I. L. R, 16 C, 330, 341 it was held that covenants for title extend to known defects also. The same view is also taken in Dart's Vendors and Purchasers, (6th Ed., p. 886) where it is pointed out that the only way in which knowledge of defects by the purchaser becomes material is that in an action to rectify the covenant, the fact may be used as the basis of an inference that it could not have been the intention of the parties that the covenant should include a defect of which both were equally aware. The question has now been decided in the same way in *Page* v. *Midland Railway*, 1894, 1 Ch, 11. The same view has been taken by the courts in America also; Rawle on Covenants for title, S. 88.

CULPABLE HOMICIDE AND MURDER

Mr. R. A. Nelson at pages 282-284 of his edition of the Indian Penal Code says in effect that the definition of culpable homicide in S. 299 and that of murder in S. 300 of that Code are identical, and that culpable homicide is murder unless it falls within one of the exceptions to S. 300. It is *prima facie* improbable that the same thing should be distinguished by two different names and defined in different sets of words in two different places, that, in

short, one section should only be a paraphrase of another. It is obvious from the way in which S. 300 is begun that it was the intention of the framers of the Code that, independently of the exceptions, culpable homicide should fulfil some further conditions to constitute the graver offence of murder. Section 299 defines culpable homicide and S. 300 commences "culpable homicide is murder, if etc." Then follow certain conditions. It happens that some of these conditions are identical with some of those of culpable homicide. In such cases, no doubt, culpable homicide would without more, be murder. But there are other cases which fall readily under S. 299, but do not, except by a twist of words, fall under S. 300. An instance of this is where an act is done with the knowledge that it is likely to cause death, but without intention to cause death or a knowledge that it is so imminently dangerous that it must, in all probability, cause death. Such an act would be culpable homicide not amounting to murder. Before the introduction of S. 304 A. attempts were made to bring under this class cases of death caused by rashness or negligence. Though such attempts were, no doubt, reprehensible, that would form no ground for taking away from the class of culpable homicide not amounting to murder, cases legitimately belonging to it.

There are thus two classes of culpable homicide not amounting to murder—(1) murder falling within one of the exceptions, (2) culpable homicide failing to fulfil the further conditions of murder. Now, S. 304, defining the punishmnnt for culpable homicide not amounting to murder, makes two divisions of the offence—(*a*) where there is the intention to cause death, (*b*) where there is knowledge that death is likely to be caused, but no intention to cause death. Broadly speaking the class marked (1) corresponds to (*a*), and the class marked (2) corresponds to (*b*). A solitary exception occurs to me and that is where an act is done with knowledge of its imminent danger but without intention to cause death and with the consent of the deceased. Such an act, though murder falling within one of the exceptions, is punishable, by the wording of the section, only under (*b*). If according to Mr. Nelson's view, culpable homicide not amounting to murder consisted only of cases of murder falling within one of the exceptions, there would be neither rhyme nor reason in this twofold division in S. 304. If the

legislature was so scrupulous as to make a distinction in the punishment between intention and knowledge without intention in cases of murder falling within one of the exceptions, why, it may well be asked, did it not make the same fine difference in cases of murder itself?

The current of decided cases is strongly against Mr Nelson's view. If his view were correct, there could be no conviction of culpable homicide not amounting to murder, unless the benefit of one of the exceptions to S 300 is pleaded and given. I shall take for illustration only cases that have been decided since 1870 (*i.e.*) the date of the introduction of S. 304 A.

A snake-charmer exhibited in public a venomous snake whose fangs he knew had not been extracted; and to show his own skill and dexterity, but without any intention to cause death to any one, placed the snake on the head of one of the spectators; the spectator tried to push off the snake, was bitten, and died in consequence. The judges said, "He did not intend to cause death; nor did he, knowing that the act was so imminently dangerous that it must, in all probability, cause death, put the snake upon the boy." He was, therefore, held not guilty of murder. "But we think that the act was done with the knowledge that it was likely to cause death, but without the intention to cause death." He was, therefore, held guilty of culpable homicide not amounting to murder and punished under S. 304. Section 304A was expressly held inapplicable. (*Empress* v. *Gonesh Dooley*, I. L. R, 5 C, 351.)

In *Empress of India* v. *Idu Beg*, I. L. **R**, 3 A, 776, the accused, in a verbal wrangle with his wife, struck her a blow on the left side, with great force, the result of which was that she within little more than an hour died, *Straight, J.* in the course of a lucid judgment, said:—"The primary questions in the case therefore to be disposed of were, looking at the character of the act, the instrument with which it was committed, and the extent of injury inflicted, whether (1) the accused intended to cause death or bodily injury likely to cause death, (2) whether as a reasonable man he must have known that the act was so imminently dangerous that death or bodily injury likely to cause death would be the most probable result, (3) whether as a reasonable man he must have known that death would be a likely result. If the conduct of the accused

fell within either of the first two descriptions, it amounted to murder; if it was covered by the last, his offence was culpable homicide not amounting to murder. . . . . S. 304 creates no offence, but provides the punishment for culpable homicide not amounting to murder, and draws a distinction in the penalty to be inflicted, where, an intention to kill being present, the act would have amounted to murder, but for its having fallen within one of the exceptions to S. 300, and those cases in which the crime is culpable homicide not amounting to murder, that is to say, where there is a knowledge that death is likely to be a result, but intention to cause death or bodily injury likely to cause death is absent. Putting it shortly, all acts of killing done with the intention to kill or to inflict bodily injury likely to cause death, or with the knowledge that death must be the most probable result, are *prima facie* murder, while those committed with the knowledge that death will be a likely result are culpable homicide not amounting to murder."

In *Queen Empress* v. *Huree Mohun Mythee,* I L. R, 18 C, 49, the celebrated Bengal case of a man having had sexual intercourse with his immature wife and thereby caused her death, the prisoner was charged, under the first count, with culpable homicide not amounting to murder. It is evident he could not plead provocation, self-defence or any of the other exceptions. It is therefore difficult to see why he was not charged with murder, if culpable homicide were identical with murder except when it falls under one of the exceptions.

In *R* v. *Nidamarti Nagabhushanam,* 7 M. H. C. R., 119, *Empress* v. *Ketabdi Mundul,* I. L. R, 4 C, 764, *Queen Empress* v. *Damodaran,* I. L. R, 12 M, 56, *Reg* v. *Govinda,* I. L. R, 1 B, 342, the conviction of culpable homicide not amounting to murder was upheld, though none of the exceptions to S. 300 could be pleaded.

I may also add R. v. *Nadamooney* tried at the last Sessions of the High Court of Madras held in February. The jury found the accused not guilty of murder but guilty of culpable homicide not amounting to murder, on the ground that the prisoner was guilty of doing an act likely to cause death, but that he did not do the act with the intention of causing death. The presiding judge accepted the verdict and sentenced the prisoner to five years' rigorous imprisonment. (*The Madras Mail, February* 13, 1894).

M. A. T.

NOTES OF INDIAN CASES.

Ranganayakulu *v.* **Prendergast**, I. L. R, 17 M, 37. It seems to us that the decision in this case is not correct. We have of course nothing to do with the conduct of Mr. Prendergast. We do not know whether it was a *bona fide* exercise of his power when he proceeded to disperse the procession or whether he was judicious in commanding the emblems carried to be taken down. There is great need for the magistracy and the police exercising all their legitimate authority for the purpose of protecting the exercise of lawful rights or the time-honoured customs or usages of the community. But we think the power which the superintendent exercised in this case is a necessary power and we venture to add that the legislature has conferred it. We are unable to follow *Shephard, J.* when he says that the power to disperse *crowds* conferred by S. 49 of the Police Act does not extend to assemblies or processions. We are inclined to believe that the power to "direct all crowds of twelve or more men to disperse" is wide and the generality of the language used is for the purpose of including assemblies, processions and other bodies of men. There is again the power to *regulate the conduct* of all assemblies given by the first part of the section. Moreover Ss. 127 and 128 of the Code of Criminal Procedure appear to have been overlooked by the learned judges. An officer in charge of a Police Station may command any assembly of five or more men likely to cause a breach of the peace to disperse and may himself disperse such assembly. Now if there is a power to disperse, the power to do everything necessary for the purpose of such dispersion is conferred by implication. If pulling away the banners or other emblems carried may be the means of dispersing the assembly, the police must have the power to interfere with the possession of the emblems. It appears to us that the superintendent was technically in the right.

Siriparapu Ramanna *v.* **Mallikarjuna Prasada Nayudu**, I.L.R, 17 M, 43. The rent law is in several respects in utter confusion in this Presidency. There have been enquiries, and commissions and draft bills but no further progress is made. Act VIII of 1865 with a multitude of imperfections is still law. In a country where the land is the principal source of revenue and agriculture the chief occupation of the people, agrarian disputes embittering the feelings between land-lord and tenant ought to be carefully prevented. One question which has given rise to an enormous amount of litigation is as to where a contract to pay at a fixed rate may be implied. The only principle, if principle it can be called, towards the recognition of which we are tending, is that the High Court will accept the decision of the District Judge whether he

implies or refuses to imply a contract. We are not unmindful of the difficulty of laying down any fixed principles for the guidance of the Subordinate Courts in this matter. But we think the legislature should have anticipated this crying evil and laid down certain hard and fast rules.

The Mussoorie Bank, Limited *v.* The Himalaya Bank, Limited, I. L. R, 16 A, 53. *Knox, J.* has rightly followed in this case the rule of English Law that in a winding up secured creditors can only prove for the balance of their debts, along with simple creditors, after deducting the value of their securities.

Tasadduk Rasul Khan *v.* Ahmad Husain, I. L. R, 21 C, 66. The question as to what is a mere irregularity in publishing or conducting the sale and what is an illegality which invalidates the sale altogether has not been satisfactorily answered. The Privy Council hold that the conduct of the sale before the lapse of thirty days from the date of the publication is not an illegality which vitiates the sale without more but a material irregularity which is only a ground for avoiding the sale if substanital loss results therefrom. It is thus an *irregularity in the conduct* of the sale to hold it before the lapse of the necessary period.

Gobind Lal Roy *v.* Ramjanam Misser, I. L. R, 21 C, 70. This decision of the Privy Council must be regarded as overruling the Full Bench decision of the Calcutta High Court in *Lala Mobaruk Lal* v. *The Secretary of State for India in Council,* I. L. R, 11 C, 200. It does away with the distinction between illegality and irregularity in a revenue sale under Act XI of 1859. We do not think however it shakes the authority of the case in *Mahomed Abdul Hai* v. *Gujraj Sahai,* I. L. R, 20 C, 826. Their lordships say, " where a sale for arrears of revenue is impeached as being contrary to the provisions of Act XI of 1859, no grounds of objection are open to the plaintiff which have not been declared and specified in an appeal to the commissioner." This was the position Mr. Mitra in an article in 2 M. L. J, p. 6 contended for. Where the Act is wholly irrelevant or the collector has no jurisdiction to proceed under the Act or the sale is a fraudulent device by a mortgagee in possession to deprive the mortgagor of the property, see *Baijnath Sahu* v. *Lala Sital Prasad,* 2 B. L. R, F. B, 1 and *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan,* 10 M. I. A, 540, we conceive that as pointed out by Mr. Mitra the sale is invalid and the property may be recovered without a proceeding under the Act.

Mahommed Zohuruddeen *v.* Mahommed Nooroodeen, I.L.R, 21 C, 85. *Mr. Justice Sale* holds following the authority of *Farran, J.* in

Kahn v. *Alli Mahomed Haji Umer*, I. L. R, 16 B, 577 that an attachment of money in the hands of a receiver made without previous permission or sanction of the court whose receiver is in charge is improper and irregular and that the court will not recognize it. Property in the hands of a receiver must be held to be in the possession of the court and cannot be attached by a mere notice to the receiver. The notice must go to the court. But we cannot understand that the possession of the receiver is better than the possession of the court. It cannot be said that the leave or sanction of a court is necessary for a valid attachment of property in its possession. Section 272 specifies no such requisite. We say nothing on the question of priority for it may be that notwithstanding the attachment where property is in the hands of a receiver for distribution among creditors no one creditor can gain by mere attachment. But we think S. 272 makes the attachment valid where it is made by mere notice to the court.

Rash Behari Das *v.* **Balgopal Singh**, I. L. R, 21 C, 92. We are not disposed to accept this decision as correct. On principle we can see no reason why when a criminal appeal is rejected under S. 421 reasons should not be required to be stated. It seems to us the fact that the Code requires reasons for orders comparatively less important, as those under Ss. 213, 249, 253, 257, 263, 264, and 307 is a strong argument for reasons being stated when an appeal is rejected. The learned judges lay stress upon the word "summarily." There are numerous offences triable *summarily* under the Code and even in those cases reasons have to be stated by the court trying them summarily. See *Empress* v. *Panjab Singh*, I. L. R, 6 C, 579, *Queen Empress* v. *Shidgauda*, I. L. R, 18 B, 97. Summary disposal does not necessarily imply the non-statement of reasons for the order. We agree with *Brodhurst, J.* in *Queen Empress* v. *Narain*, I. L. R, 8 A, 514.

Queen Empress v. **Sukee Raur**, I. L. R, 21 C, 97. There can be no reasonable doubt as to the correctness of the conclusion arrived at in this case. To constitute the offence under S. 372 of the Penal Code, "there must have been some distinct arrangement between two parties that the minor's person should be *for some time* completely in the keeping and under the control and direction of the person having the possession." But we think opinion may fairly be divided as to whether the legislature may not render a person punishable who had only casual sexual intercourse with a girl under the age of sixteen, capable of giving consent. We are not convinced of the impolicy of such legislation.

Mudray *v.* **The Queen-Empress**, I. L. R, 21 C, 103. We are quite in accord with the spirit pervading the judgments of *Prinsep* and

Trevelyan, J.J. in this case. If in answer to a prosecution for a compoundable offence, a compounding is pleaded by the accused, the onus is undoubtedly upon him to prove it. An offence is said to be compounded when there is an agreement not to prosecute in consideration of some gratification pecuniary or otherwise. Although the provisions of the Contract Act do not as such apply to the agreement in question, the conditions of the validity of such an agreement are similar in many respects. It is necessary that the complainant should have understood the terms of the agreement, that there should be a consideration in the form of a gratification, and that the agreement should not have been induced by force or fraud. Their lordships rightly insist upon the person setting up the plea proving the consideration. We do not understand them to reverse the ordinary rule that where force or fraud is set up as avoiding a contract it should be affirmatively established by the person seeking to avoid it The mere production of a paper in a language of which the person that has signed it is ignorant when there has been no gratification given or promised for the withdrawal of the prosecution is not sufficient proof of a valid compounding.

Jugul Kissore Lal Sing Deo v. Kartee Chunder Chottopadhya, I. L. R, 21 C, 116 A first mortgagee purchases the property in execution of a decree obtained by him on his mortgage. But he had not made the puisne mortgagee a party although he had notice of the encumbrance. The possession of the puisne mortgagee cannot be displaced without giving him an opportunity to redeem. This was the law before the Transfer of Property Act, and S. 85 of the Act has not altered it. The observations of the Privy Council in *Gobind Lal Roy* v. *Ramjanam Misser*, I. L. R, 21 C, at page 79 also support this view.

Damu Senapati v. Sridhar Rajivar, I. L. R, 21 C, 121. We do not know that S. 537 of the Criminal Procedure Code can be invoked to cure radical defect. A magistrate has no authority to pass sentence before the judgment is ready. And a judgment written without hearing the arguments of counsel is illegal. The majority of the judges say that the fact of the appellate judge having regularly heard the appeal and confirmed the decision of the magistrate cured the defect. But we think with *Trevelyan, J.*, that the fact of a fair trial by the appellate judge can no more cure the defect in the trial by the first court than a fair trial by the first court would cure an unfair trial by the appellate court. We are however of opinion that the revisional jurisdiction of the High Court being discretionary, the High Court was not bound to set aside the judgment if it had no reason to suppose that a different conclusion would be come to on the retrial.

NOTES OF ENGLISH CASES.

South Hetton Coal Company v. North-Eastern News Association, 1894, I Q. B, 133. An action for libel will lie at the suit of an incorporated colliery company in respect of a libel calculated to injure its reputation in the way of its business without proof of special damage. The sanitary condition of a large number of cottages let by the proprietors of a colliery to their workmen is a matter of public interest fair comment on which is not libellous.

Per Lord Esher, M. R:—In every action for libel whether the statement complained of is or is not a libel depends on whether what has been published with regard to the plaintiff would tend in the minds of people of ordinary sense to bring the plaintiff into contempt, hatred, or ridicule or to injure his character. The question is the same by whomsoever the action is brought, whether by an individual, a firm, or a company. But though the law is the same the application of it is different with regard to different kinds of plaintiffs.

Per Lopes, L. J:—A corporation cannot maintain an action for libel in respect of anything reflecting upon them personally. The words complained of, must injuriously affect the corporation or company as distinct from the individuals composing it. A corporation or company could not sue in respect of a charge of murder, or incest or adultery or assault or corruption, because it could not commit these crimes, although the individuals composing it may. The words complained of must attack the corporation or company in the method of conducting its affairs, must accuse it of fraud or mismanagement, or must attack its financial position.

Mighell v. Sultan of Johore, 1894, I Q. B, 149. The courts of England have no jurisdiction over an independent foreign sovereign unless he submits to the jurisdiction, actively electing to waive his privilege upon being sued. Therefore, the fact that a foreign sovereign has been residing in England and has entered into a contract there under an assumed name as if he were a private individual does not amount to a submission to the jurisdiction, or render him liable to be sued for a breach of contract. A certificate from the Foreign or Colonial office, as the case may be, is conclusive as to the status of such a sovereign.

Bowen v. Anderson, 1894, I Q. B, 164. The plaintiff was injured through a defect in the condition of a coal plate in the pavement in front of a house let by the defendant on a weekly tenancy. The defect had existed for some months before the date of the accident. Held that a weekly tenancy does not determine without notice at the end of each

week, but some notice is required to determine such tenancy, that the continuance of the tenant's occupation on the expiration of each week did not render the defendant liable for defects then existing, as if there had been a reletting, and that it was a question for the jury whether the injury was caused by the negligence of the tenant, or by a structual defect existing at the date of the original letting for which the defendant would be liable. The grounds of the decision in *Sandford* v. *Clarke*, 21 Q. B. D, 398 disapproved.

Bulman & Dickson *v.* **Fenwick & Co.,** 1894, I Q B, 179. A charter-party which contained an exception of any delay occasioned by strikes provided that the vessel when loaded should proceed to one of certain places named and there unload. The charterers ordered her to proceed to R, one of such places. After the voyage commenced, the charterers became aware of a strike at R among the porters, which did not extend to the other places named in the charter-party. It was impossible to unload within the time stipulated, owing to the strike. The shipowners sued for demurrage.

Held by the Court of Appeal that there was no obligation on the charterers to change the order for the vessel to proceed to R on the strike coming to their knowledge, and that the delay being covered by the exception no demurrage was payable.

Chaffers *v.* **Goldsmid**, 1894, I Q. B, 186. There is no right in a person desirous of petitioning the House of Commons to compel any particular member of the House to present such petition, and no action will lie against any member for refusing to present such petition.

Per Wells, J:—It is the right of the subject to petition parliament, but it by no means follows that an action lies against a *particular* member for declining to present a petition.

Per Grantham, J:—A member of parliament is not a member for an individual constituent; he is returned by the constituency and has a duty to discharge to the whole constituency. The right to present a petition is not one which is inherent only in the petitioner's representative.

Travis *v.* **Uttley,** 1894, I. Q. B, 233. A drain passing through private ground but receiving the drainage of more than one building is a 'sewer' within the meaning of the Public Health Act, 1875.

In re **a Solicitor,** *Ex parte* **Incorporated Law Society,** 1894, 1 Q. B., 254. Held that it was a case for the exercise of the disciplinary powers of the court, where a solicitor was found guilty of professional

misconduct in having accepted as a loan large sums of money from a client who had just attained his majority and was a good deal under the influence of his professional adviser.

Butler *v.* **Butler,** 1894, P, 25. The verdict of a jury at the trial of a petition for divorce by a wife against her husband finding that the husband has been guilty of adultery and cruelty and a decree *nisi* in accordance with such verdict, are conclusive evidence of such adultery and cruelty in a subsequent suit between the same parties, in which the husband seeks similar relief against the wife. The fact of such decree *nisi* having been set aside upon the intervention of the Queen's proctor, on grounds not affecting the propriety of the verdict does not prevent the findings of the jury from being conclusive in the second suit.

In the goods of Tamplin, 1894, P, 39. A testator domiciled in England left a will and two codicils dealing with real and personal property in England and personalty in Russia, and also two other documents one of which was a will duly executed in accordance with English law and both referring only to real property in Russia and appointing separate executors in respect of that property to pass the joint application of the executors and trustees of all the property in both countries; the court refused to allow the documents referring only to property in Russia to be included in the probate of the English will and codicils.

In re **Webb, Lambert** *v.* **Still,** 1894, 1 Ch, 73. Solicitor-trustees of a will who are authorized to charge for professional services done by them, ought in settling accounts with their *cestuis que trust* under the will to inform them that they were entitled to have a bill of costs for the amount appropriated by the trustees for professional charges and if they thought fit, to have the bill taxed. But the mere omission to give such information, in the absence of any error in the accounts or any thing to show that injustice would be done by allowing the settlement to stand, is no ground for re-opening the accounts. *Davey, L. J.* pointed out the difference between cases where the accounting party is a trustee and where he is not. He observed, "Where they (*i.e.*, the parties to a settled account) are in a fiduciary position, the court sets aside the account upon proof of some error and allows the account to be taken notwithstanding the settlement: but where the parties are not in a fiduciary position upon proof of an error in the absence of fraud, all the court does is to give an opportunity to surcharge and falsify."

Malleson *v.* **National Insurance and Guarantee Corporation,** 1894, 1 Ch, 200. A company cannot deprive itself of the power to vary the articles of association, *North, J.*

Smith v. Hancock, 1894, 1 Ch, 209. A grocer who sold his business contracted with the vendee "not to carry on or be in anywise interested in" any similar business within a certain area. Held that this agreement was not broken by the vendor taking a merely domestic or sentimental interest in a similar business, by assisting his wife who carried on a similar business of her own by obtaining a lease of the shops in her own name, during her illness, by issuing, a circular inviting 'old firiends' to come to the shop, handing copies of the circular to a few persons including a tenant of his own, introducing her manager to some provision merchants or attending at the bank when the wife opened the banking account in her own name for the business.

MISCELLANEOUS.

We beg to acknowledge with thanks the receipt of the following legal publications :—

The Canada Law Journal for February (*in exchange*).

The Canadian Law Times for February (*in exchange*).

The Green Bag for February (*in exchange*).

The Western Law Times for February (*in exchange*).

The American Law Review for February (*in exchange*).

The Harvard Law Review for February (*in exchange*).

Covenants for Title in Conveyances of Land in India :—Messrs R. and R., Calcutta, write to us as follows :—You are aware that deeds of conveyance in the English form ordinarily contain what are commonly called *covenants for title* and you, and most of your readers probably, know that a conveyance from an absolute owner of the fee simple, or of what is equivalent thereto, contains four of such covenants, *viz.*, for right to convey, for quiet enjoyment, for freedom from incumbrances, and for further assurance.

To put it less technically the grantor covenants that nothwithstanding any act done by him he has a right to convey the premises in the manner he has assumed to do, that the grantee shall, so far as the vendor and his heirs or any person claiming under him or them is or are concerned, quietly enjoy them, free from incumbrances created by the vendor or his heirs or any person claiming as aforesaid, and that he, the grantor, will make such further assurances as may be required to effectually vest the property in the grantee.

Such covenants in a conveyance are not usually what are called absolute or in other words they do not, as in a mortgage, extend to protect the grantee from every eviction or disturbance, or the danger of such, arising from any flaw in the title, or to entitle him to call for removal of such flaw, but only as security against the acts of persons with whose dealings he has some reasonable and peculiar means of becoming acquainted. It follows that there is usually inserted in the covenants for title an enumeration of the persons against whose acts the grantor convenants.

For instance if the vendor derives his title by descent or heirship he is expected to covenant against the acts of his ancestors as well as the acts of himself and of those under him. Where however the vendor has acquired the property by purchase he usually convenants (in the English form) against acts subsequent to his purchase or merely that "notwithstanding any act &c., done by him or any one claiming under him" he has a good right to convey.

Now a difficulty which lately cropped up unexpectedly in our office arose thus:—

Wishing to get good covenants for title from a vendor who had acquired his title not by descent but by purchase we inserted, at the end of the draft of the convenants for title, the words " or his predecessors in title" intending thereby to make him indemnify our client, the purchaser, against the acts and defaults of his predecessors also.

In approving of the draft the vendor's solicitors struck out the aforesaid words " or predecessors in title " and objected thereto, whereupon we turned to the Transfer of Property Act and found that it provides in S. 55, sub-section (*g*) as follows :—

"The seller is bound . . . . (except where the property is sold "subject to incumbrances) to discharge incumbrances then existing on the property," and further in the same section, clause II, that:—

" The seller shall be *deemed* to contract with the buyer that the " interest which the seller professes to transfer to the buyer subsists, and " that he has power to transfer the same."

Thereupon we wrote to the vendor's attorneys thus :—

" Under S. 55 of the Transfer of Property Act the vendor, as owner, "is bound to covenant with our client as purchaser that the interest " which he professes to transfer to him subsists, and that he has power " to transfer the same. Hence either the words you have struck out "must stand or the word 'notwithstanding' to the word 'contrary' " should be omitted to accord with the Act."

To this the vendor's solicitors replied,—

"The covenant in question as drawn was an absolute one, such as "only a vendor who derives immediate title under a voluntary instru-"ment is bound to enter into. Hence, as our client is a 'purchaser,' "we struck out the 'predecessors in title' wherever they occurred. "You have adopted the English form of covenant for title, with which "the words objected to by us are not under the circumstances consis-"tent, and we must ask you to elect whether you will retain such form, "in which case our elimination must stand, or whether you will re-draft "covenants for title in the precise words of S. 55 of the Transfer of "Property Act to which you appeal."

Deeming covenants in terms of clause II of S. 55 of the Transfer of Property Act more beneficial to our client than the restricted covenants usually inserted in the English form, we (with our client's concurrence) struck out the ordinary covenants and inserted a covenant on the part of the vendor his executors, administrators, representatives and assigns, "that the interest in the said assured hereditaments and premises which "the said . . . . (vendor) professes hereby to transfer to the said . . . "(purchaser) *subsists* and that he has power to transfer the same."

This you will admit is short and sweet.

Will some of your readers let us know, through the columns of your journal, whether they would have similarly acted or what covenants they would have inserted in the circumstances having regard to sub-section (*g*) and Clause II, and regard being had to the fact that the Transfer of Property Act is silent as to covenants for quiet enjoyment and for further assurance?

We should also like to know what provisions your readers would suggest should be inserted in an *agreement* for sale in order to secure the insertion of absolute covenants in the conveyance.

P. S. In cases where ordinary English covenants have been taken since 1882 would they curtail the rights of the purchaser under S. 55 or would the seller still be *deemed* to give an absolute convenant, or in other words, would the parties be deemed to have contracted themselves out of the Act?

Sir James Stephen.—The death of Sir James Stephen with its prelude of long illness and deep pathos, has removed from our midst a great jurist. His reputation lies in his books rather than in his record as a judge, for, considering his learning and powers of research, the

number of important judgments with which his name is connected in the "Reports" is small. It was as an author rather than as an advocate that he made his mark at the Bar; it was as a jurist rather than as a judge that he acquired his wide reputation during the twelve years he occupied a seat on the Bench. If he had a principle to expound, and its history to trace, his intellectual powers shone brilliantly, but whenever he had to deal with technical details he appeared ponderous and unhappy. To be at his best he required a theme. To this extent, therefore, there was some truth in the saying that he was a philosopher among lawyers and a lawyer-among philosophers. Nevertheless, he was almost an ideal judge in criminal cases, having a remarkably keen sense of the relevancy of evidence, a firm grasp of facts, and a power of weighing the evidence with an impartiality which could never be questioned. What he lacked was a lightness of touch. It has been truly remarked that he dealt with every question with the tremendous precision of a Nasmyth hammer.—*Law Journal.*

Liability for necessaries.—His honor, Judge Lumley Smith, decided that a new set of false teeth was not a necessary for which the separated wife of a Sussex saddler was entitled to pledge her husband's credit. We hope the teeth supplied were as sound as the law; but in giving judgment the learned judge hardly gave sufficient effect to the maxim that the luxuries of one generation are the necessaries of the next, and its possible application to the case of artificial teeth, for he said that man had done without them for centuries—in fact, during the reign of the common law—and that no parish doctor would order them to be supplied as parish relief, to which the modern philanthropic politician would, like Bumble, reply, 'The Poor Law's a hass.' We have heard of another husband who took a different view of his rights as to his wife's false teeth. His house was burnt and she within it, where-upon he included in his claim on his fire-policy £10 in respect of his interest in the false teeth:—*Law Journal.*